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No. 03-312

Supreme Court, U.S
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IN THE

Supreme Court of the United States

MAHER TERMINALS, INC.,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS
U.S. DEPARTMENT OF LABOR and VINCENT RIGGIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PRELIMINARY STATEMENT

Petitioner seeks certiorari in order for this Court to decide the appropriate test for determination of employment status under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901 *et seq*. Specifically, petitioner seeks clarification as to whether the appropriate inquiry is an analysis of the job duties of the job for which the worker was hired when injured (as held by the Ninth Circuit)[1] or an analysis of the entire period of employment with a particular employer without regard to the term of employment or

[1] The Ninth Circuit restricted the maritime status inquiry to the term of the employment for the job in which the worker was engaged when injured. *McGray Construction Co. v. Director, OWCP*, 181 F.3d 1008 (9th Cir. 1999).

contract of employment (as held by the Third Circuit). As discussed in detail in the brief of *amici* (*Amici Brief* pp. 8-10), this is an important question of federal maritime law which should be clarified by this Court. The Respondent Director appears to agree with Petitioner that the proper time period for the status inquiry is the "term of employment". Since this is not the holding of the Third Circuit, the Supreme Court should grant the Writ and resolve the conflict. At a minimum, Respondents' interpretations of the holding below and the holdings in *McGray Construction Co. v. Director, OWCP*, 181 F.3d 1008 (9th Cir. 1999) and *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 558 (1997) highlight the need for this Court to eliminate the confusion.

THE FACTS

Respondents acknowledge that Mr. Riggio was on Maher's permanent *hire* list (App. 3a) (Brief of Respondent Riggio p.2) (hereinafter "Riggio Br.") (Brief of Respondent Director p. 9) (hereinafter "Director Br.") but then go on to assert that Mr. Riggio enjoyed a permanent employment relationship with Maher (Riggio Br. p.10; Director Br. p. 9). This is not supported by the record. As stated in the petition, employment of all terminal labor (including clerks and checkers) in the Port of New York and New Jersey is governed by the Waterfront Commission of New York Harbor Rules and Regulations[2] and the Collective Bargaining Agreement between the New York Shipping Association, Inc. and the International Longshoremen's Association[3]. Pursuant to these documents, all terminal labor is casual. Being on a permanent hire list merely entitles the individual to receive first priority to be hired at a particular pier the following day

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[2] Codified at 21 NYCRR 1.1 *et seq.* (hereinafter "*WCNYHRR*").

[3] Administrative Law Judges are permitted to take judicial notice of the Collective Bargaining Agreement pursuant to the Federal Rules of Evidence, Rule 201.

depending on the needs of the operator of that pier. See, generally *WCNYHRR*, 21 NYCRR § 7.1-7.45. An employer is required to notify the Telecommunication Hiring Employment Information Center no later than 1:45 p.m. each day which of its regular and regular-extra gangs and list employees it intends to order during the following 24-hour period and those workers may report directly to the pier. *WCNYHRR*, 21 NYCRR § 7.14. Thus, except for extraordinary circumstances (not present in this case), the term of employment for all union labor on the New York/New Jersey waterfront is 24 hours or one day. Respondent Riggio does not dispute that when he (or any other clerk) was hired as a clerk, he could not be transferred to a checker job during that employment. Further, as stated by *amici*, such a transfer would be contractually prohibited (*Amici* Br. p. 5-6 n. 4).

Respondent Riggio disputes our assertion that claimant was a casual day laborer and that Maher orders labor each day from the local union hiring hall.[4]

Riggio's counsel goes on to suggest that Riggio was a permanent employee of Maher. While we acknowledge that the significance, or lack thereof, of claimant being on Maher's permanent "hire" list may not be entirely clear in the record below, we are also crystal clear that the two trial judges who heard this case understood the hiring system from years of trying cases in New York and were fully aware when determining that claimant lacked "status" that claimant was not a permanent employee of Maher.[5] Contrary to

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[4] This information was provided as "General Background" for those unfamiliar with the hiring system in the Port of New York/New Jersey and is supported by the Collective Bargain Agreement cited by *amici* (*Amici* Brief at 5-6, n. 4) and the *WCNYHRR*.

[5] As indicated in the Collective Bargaining Agreement and the Waterfront Commission Rules, the entire Port of New York/New Jersey is a casual day labor force for union workers. Being on a "list" merely entitles one to "priority of employment". *WCNYHRR*, 21 NYCRR § 7.2(a).

Respondents' assertions, the Third Circuit did not find that Riggio was a permanent employee of Maher but rather limited its inquiry to "Riggio's work history while employed by Maher" (App. 13a).

ARGUMENT

The Maritime Status Tests Applied by The Third and Ninth Circuits Are Fundamentally Different

Respondents argue that there is no conflict between the Third Circuit decision in this case (App. 1a-13a) and the decision of the Ninth Circuit in *McGray Construction Co. v. Director, OWCP*, 181 F.3d 1008 (9th Cir. 1999) on the ground that claimant's inclusion on Maher's permanent hire list makes him a permanent employee of Maher[6]. Without conceding this to be factually correct, it appears to petitioner that, for Respondents' argument to have any merit, they must concede that the "employment contract" or "term of employment" is the appropriate period for the inquiry into employment status. This is not consistent with the holding of the Third Circuit but is consistent with the Ninth Circuit holding in *McGray Construction*.

The Third Circuit held in this case that Mr. Riggio's prior employments with petitioner as a checker confer maritime status even when he is employed in the indisputably non-maritime job of clerk[7]. The Ninth Circuit has held that overall

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[6] As stated in *The Facts, supra*, Riggio was not a permanent employee of Maher. However, resolution of this factual issue does not affect petitioners arguments that the Supreme Court should resolve the legal question presented, i.e., whether employment status should be determined based upon the "term of employment" or "overall employment history with a particular employer".

[7] It is conceded by Respondents and the Court below that Mr. Riggio was hired as a statutorily excluded clerk on the day of his injury. 33 USC 902(3)(A); *See, also, Maher Terminals, Inc. v. Farrell*, 548 F.2d 476 (3rd Cir. 1977).

employment history should not be considered but rather one should look at the job duties of the employment in which the employee is engaged at the time of injury. *McGray Construction*, 181 F.3d at 1014. (Was claimant engaged in maritime employment *on this job*?).

Much like the Third Circuit, the Respondents attempt to argue that there is no conflict among the Circuits. Specifically, respondents argue that *McGray Construction* only stands for the proposition that a worker cannot use overall employment history with multiple employers to confer status. In fact, Hurston (the claimant in that case) had worked for McGray Construction as a marine diver in the past and 90% of his overall employment history was marine diving. *McGray Construction Co. v. Director*, 112 F.3d 1025, 1033 (1997).[8] Thus, the only basis for disputing the conflict among the circuits is factually erroneous.

Respondents attempt to portray this petition as a disagreement with the Third Circuit's determination of a purely factual issue. The petition is much more important than the Director's misrepresentation suggests. It confronts an attempt by the Director to expand the coverage afforded by the LHWCA despite the 1984 Amendments which were intended to restrict coverage (Petition Point IV at 16-18). Respondent Director has consistently taken the position that "once a maritime worker, always a maritime worker". *See, e.g. McGray Construction*, 181 F.3rd at 1015-16; *Sea-Land Serv., Inc. v. Rock*, 953 F.2d 56, 67 n. 17 (3rd Cir. 1992).

His attempt to couch this petition as a dispute over the facts is specious at best. The Director concedes that the period the

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[8] As stated in the petition, the Ninth Circuit originally had accepted the Director's argument (the same argument the Respondents are making here), but withdrew that opinion in light of this Court's holding in *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997). (Petition at 8-9.)

Third Circuit used to determine employment status was ill-defined. The Director goes on to define it as maybe two or three years when claimant was on Maher's permanent hire list. (Director Br. 2-3, 8). As previously noted, Respondents argue that the permanent hire list equates to permanent employee status[9]. However, both Respondents agree that Riggio had worked for other employers during this 2-3 year period. (Director Br. 3-4; Riggio Br. 3; App. 17a). Having worked for other employers during the two or three year period, Riggio cannot be considered a permanent employee of Maher. Nowhere in the Third Circuit opinion does the Court find that Riggio was a permanent employee of Maher. Rather, the Third Circuit distinguished *McGray Construction* by restricting its inquiry to "only Riggio's work history while employed by Maher". (App. 13a). In other words, the Third Circuit applied a modified "overall employment history" test by inquiring as to Mr. Riggio's overall employment history *with Maher*. Under this test, a worker with a history of 99% maritime employment who takes a one day clerk job with another employer is not covered, but Riggio with a 50% past maritime employment history is. This creates confusion for employee and employer alike.

Respondents attempt to obscure the holding below by raising the permanent employee issue not addressed by the Court. However, the holding below is clear. A worker (Mr. Riggio in this case) satisfies the employment status requirement for coverage under the LHWCA if he has worked for a particular employer 50 percent of the time in covered work and 50 percent of the time in non-covered work and was injured while engaged by the same employer in non-covered work on the day of his injury (App. 13a). While the holding is

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[9] The Director appears to be proposing a new question for certiorari, i.e., whether being on an employer's permanent hire list modifies the Collective Bargaining Agreement and the *WCNYRR* to create "permanent employee" status.

clear, the approach taken is not. The panel did not identify the relevant time period for the 50/50 inquiry nor did the panel indicate whether some smaller percentage of covered employments would be sufficient to satisfy the status requirement. As indicated in the petition and by *amici*, the approach taken by the Third Circuit, if not addressed by this Court, could potentially lead to nationwide uncertainty as to who is covered and who is not covered by the LHWCA. The ambiguity hastened by the Third Circuit's approach has not been addressed by Respondents.

Conversely, the Ninth Circuit has developed a clear and easily applied test for determining employment status. In *McGray Construction*, the Court held that a worker could not use overall employment history to confer status where the worker was engaged at the time of injury in non-maritime employment. *McGray Construction*, 181 F.3rd at 1014. The Ninth Circuit looked at the job duties for the *employment* in which the employee was "engaged" at the time of injury. *Id.* On the day of his accident, Mr. Riggio was "engaged" (hired) as a clerk in indisputable non-maritime work. He could not be reassigned to maritime work during his term of employment (App. 2a; *see also*, brief of *amici* pp. 5-6 at footnote 4). In the Ninth Circuit, this would be the end of the inquiry and Mr. Riggio would be excluded from coverage.

The tests applied by the Third Circuit and Ninth Circuits are fundamentally different and are in direct conflict. Petitioner urges this Court to grant certiorari to resolve this conflict in order to provide uniformity in the application of this federal statute. Employers and employees, on a uniform national basis, should know whether the job assignment is covered employment under the LHWCA or not covered "before a particular work day begins". *Harbor Tug*, 520 U.S. at 558. The decision below rejects the holding of this Court in *Harbor Tug* and the Ninth Circuit's decision in *McGray Construction* which followed *Harbor Tug*.

The Court Below Had Subject Matter Jurisdiction

Respondents have raised the issue of the subject matter jurisdiction of the Third Circuit to hear the case. This issue was raised by motion of the Director to dismiss the appeal to the Third Circuit. The Director argued that the appeal was from a non-final order of the BRB since the BRB used the word "remanded". The Third Circuit denied the "motion because although the Board remanded the case to the ALJ for further consideration, there was nothing more for the ALJ to decide in light of the parties' stipulation resolving all issues except for the legal question of coverage" (App. 5a-6a, n.3). The BRB, after deciding the sole issue remaining in the case (status under the LHWCA), stated "the case is remanded to the Administrative Law Judge for consideration of any remaining issues" (App. 32a). The Director, and now Mr. Riggio, seized upon the "remanded" ruling to claim that the BRB's order was not a final order under Section 21(C), 33 U.S.C. 921(C) and that the Third Circuit erred in maintaining jurisdiction.

Respondent Director's statement that the stipulation was entered into *after* petitioner filed the petition for review in the court below (Director Br. 13) is a clear misrepresentation of the procedural facts. In fact, as the Third Circuit found, following the BRB first decision (App. 37a), the parties entered in a stipulation resolving all issues subject to the final resolution of the coverage issue (App. 4a). The stipulation was submitted as an exhibit to ALJ Romano at the hearing on remand. However, because ALJ Romano ruled that claimant was not covered under the LHWCA, he did not "so order" the stipulation.

Petitioner believes that the Third Circuit's ruling that it had subject matter jurisdiction was correct. It is unclear whether Respondents are urging this Court to decide this issue. It appears to petitioner that this Court has not ruled on the Third Circuit interpretation of the scope of the finality requirement

contained in section 21(c), 33 U.S.C. § 921(c). Perhaps the Court should grant certiorari on this issue as well.

CONCLUSION

It is respectfully submitted that this petition should be granted to resolve a conflict among the Circuits over the appropriate test for employment status under the Longshore & Harbor Workers Compensation Act and to remedy an erroneous Third Circuit decision that conflicts with prior decisions of this Court and legislative intent.

Respectfully Submitted,

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